Date: February 7, 1997

Case No.: 95-INA-00239

In the Matter of:

A.P.C. CONSTRUCTION,
Employer

On Behalf Of:

DIONICIO CARIAS,
Alien

Appearance: John J Murphy, Jr., Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

**Statement of the Case**

On June 28, 1993, A.P.C. Construction ("Employer") filed an application for labor certification to enable Dionicio Carias ("Alien") to fill the position of Woodworker (AF 66-67). The job duties for the position are:

> Construct custom furniture. Construct wood forms according to specifications. Study blueprints, sketches and diagrams to determine type and dimension of forms to be constructed. Saw lumber to blueprint specifications using hand and power tools. Repair surface defects, preparation of wood for finishing. Wood restoration. Restoration of antique furniture by matching wood, grains, etc. to match original pieces.

The Employer requires three years of experience in the job offered. Other Special Requirements are:

> Knowledge in all facets of woodwork, cutting, woodturning and carving. Adept at measuring, cutting, sanding and drilling. Experienced in the use of all hand and power tools used within trade. Experienced antique restoration, remodeling and reconstruction.

By letter dated September 29, 1993, the Employer amended the wage offer to $13.88 per hour (AF 68).

The CO remanded the application to the State Office on March 14, 1994 (AF 60). On March 28, 1994, the Employer was notified that its application for labor certification had been remanded to the State Office because the amount of experience required is considered to be excessive (AF 63-64). The Employer was advised to either amend or justify the experience requirement.

On March 30, 1994, the Employer responded to the remand that its experience requirement of three years is justified by business necessity (AF 62).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued a Notice of Findings on May 9, 1994 (AF 52-58), proposing to deny certification on the grounds that the Employer's requirement for three years of experience in the job offered is considered to be excessive and unduly restrictive, in violation of § 656.21(b)(2)(i)(A)(B). The CO determined that the described duties compare to the occupation defined as Cabinetmaker in the *Dictionary of Occupational Titles* ("DOT"), which requires only one to two years of experience. The Employer was directed to rebut the NOF by: (1) documenting how the restrictive requirement is justified by business necessity; (2) deleting the restrictive requirement and readvertising; or, (3) documenting that the restrictive requirement is customary in the United States.

Accordingly, the Employer was notified that it had until June 13, 1994, to rebut the findings or to cure the defects noted. On June 9, 1994, Counsel for the Employer requested an extension of time of 45 days as the Employer elected to readvertise the position and they are currently waiting for approval of the proposed advertisement from the State Office (AF 44). The request for an extension of time was granted on June 21, 1994 (AF 40, 43), and the date for rebuttal documentation was changed to July 28, 1994. On July 8, 1994, Counsel for the Employer again requested an extension of time to file rebuttal as the advertisements have been placed and they are awaiting the final documentation notice from the State Office (AF 39). This request for an extension of time was also granted by letter dated July 14, 1994 (AF 10, 38), with rebuttal documentation now due on September 1, 1994.

In its rebuttal, dated August 31, 1994 (AF 7-9), Counsel for the Employer contended that after readvertising the position with the new requirement of two years of experience, one U.S. applicant was found to be qualified and was hired. The Employer had another position available for this applicant and continues to request labor certification for the Alien. The Employer also submitted a rebuttal statement dated August 30, 1994 (AF 18-20), contending that it had readvertised the position after amending the experience requirement to two years in conformance with the NOF.

The CO issued the Final Determination on September 12, 1994 (AF 4-6), denying certification because the Employer has filled the petitioned position with a U.S. worker and the CO determined that permanent, full-time work for the Alien is no longer available, per § 656.3. The CO explained that the application for labor certification listed only one job opening and that has now been filled with a U.S. worker.

On September 16, 1994, Counsel for the Employer requested review of the Denial of Labor Certification (AF 1-2). The Employer separately requested review of the Denial of Labor Certification on September 30, 1994 (AF 3). In January 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Counsel for the Employer submitted a Brief on February 15, 1995.

## Discussion

To issue a Final Determination denying labor certification, a CO must follow a specified path. First, the CO must issue the NOF, letting the employer know that the CO is contemplating a denial, specifically stating the basis for the proposed denial, and informing the employer that it is

allowed to submit documentation and arguments to cure the defects or rebut the basis for the denial. Section 656.25(c)(2)-(3). If the employer timely submits such documentation and argument, the CO must then examine this additional information, in conjunction with that previously received, and determine whether labor certification should be granted or denied. Section 656.25(f). If the CO decides that a denial is still warranted, the Final Determination is issued, stating the basis for the denial. Section 656.25(g)(2)(ii). Any basis for denial appearing in the Final Determination must have first appeared in the NOF. See *In the Matter of Downey Orthopedic Medical Group,* 87-INA-674 (March 16, 1988). A CO cannot raise an issue for the first time in the Final Determination because it deprives the employer of the opportunity to rebut or cure the defect, denies due process, and violates § 656.25 (c)(20). *Marathon Hosiery Co., Inc.,* 88-INA-420 (May 4, 1989) (*en banc)*; *Dr. & Mrs. Fredric Witkin,* 87-INA-532 (Feb. 28, 1989) (*en banc).*

In the instant case, the Employer was informed in the NOF that the CO was contemplating a denial of labor certification because the Employer was offering the job with unduly restrictive job requirements (AF 54). As such, the Employer was advised that to rebut the conclusion that the requirements were unduly restrictive, it would have to prove that the requirements were a business necessity or delete the requirements and readvertise.

The Employer chose to readvertise the job opportunity as permitted by the CO (AF 7-8). As a result of the new advertisement, the Employer received the application of and hired a qualified U.S. worker. However, the Employer then argued that it still had a need to hire the Alien.

Instead of issuing a second Notice of Findings, the CO proceeded directly to issue his Final Determination, which denied labor certification, finding that the Employer filled the petitioned position when it hired the U.S. applicant (AF 5). Thus, in the CO's opinion, permanent, full-time work was no longer available. This basis for denial, however, was not specified in the NOF as required by § 656.25(c)(2). To deny labor certification at this stage of the proceedings on a basis which was not mentioned in the NOF violates § 656.25 and the due process considerations this section was set up to preserve by not allowing the Employer to rebut this conclusion. See *Downey, supra*.

To ensure that the Employer's due process rights are not violated, we remand this case to the CO pursuant to § 656.27(c)(3) for further fact finding and determination. *Dr. Mary Zumot,* 89-INA-35 (Nov. 4, 1991).

On remand, the CO is instructed to issue a second Notice of Findings setting forth his grounds for proposed denial and to afford the Employer an opportunity to rebut.

## ORDER

The Certifying Officer's denial of labor certification is hereby **REMANDED.**.

Entered this the _____ day of February, 1997, for the Panel.

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RICHARD E. HUDDLESTON
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, N.W., Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.